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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 666

WILLIAM F. WORTHAM

versus

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

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American Printing Co., Ltd., 424 Camp Street

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The petitioner, William F. Wortham, prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Fifth Circuit in affirming the conviction of petitioner of a conspiracy to defraud the United States.

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 349) has not yet been reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered December 30, 1947. A petition for rehearing was filed (R. 355), and denied February 12, 1948. (R. 363)

The jurisdiction of this Court to review the decision herein, is invoked under Section 240(a) of the Judicial

Code, as amended by Act of February 13, 1925, appearing in Title 28 United States Code Annotated, Section 347. See also Rule 37(b)(2) of the Federal Rules of Criminal Procedure.

QUESTIONS PRESENTED

1. Whether a confession obtained by F.B.I. agents of a civil crime from an officer of the Navy through the aid of the Navy by issuance of Naval orders that the officer suspicioned report for questioning, and by such orders he was brought before the F.B.I. agents and instructed by a superior officer present that he was ordered there for questioning and would be questioned by those present, and was so questioned, admissible in a criminal trial where he is charged in the federal court, or is not such confession thereby rendered inadmissible under the rule of McNabb v. U. S. 318 U.S. 332, and inadmissible for the further reason as being obtained involuntarily, through compulsion and coercion.

2. If a co-defendant who has given a confession which was admitted over objection that it was obtained involuntarily, through compulsion and coercion, and such confession implicates both defendants on a charge of conspiracy, and such co-defendant does not appeal his conviction, is the other defendant thereby estopped to urge as prejudicial error on appeal as to him error in admission of such confession, and especially when such confession was, under the charge to the jury, evidence for the jury to consider as to the guilt of both defendants.

STATEMENT

Petitioner was convicted on a charge of having conspired with one Wilfred Andrew Lacour to defraud the United States in acting in the capacity of a Commander in the Navy, in the purchase of sporting equipment with funds of the United States, and in selling such equipment for his own use. (R. 2-15, 20-21)

During the trial a written confession of petitioner (R. 338-341), was offered in evidence over objection by counsel for petitioner on the grounds it was obtained involuntarily, through compulsion and coercion. (R. 293). The court heard evidence out of the presence of the jury on the objection, and which showed the following:

Petitioner was a Commander in the Navy; he had taken part in the invasion of Okinawa, and was returned to the United States by air to his home in Texas, and which was considered a recuperation leave. After he arrived home he received a telegram to proceed to New Orleans for temporary additional duty. He arrived in New Orleans and checked in at the Federal Building in New Orleans in accordance with his orders. He reported to a Captain Levy who was District Personal Officer, and orders were found that he was reporting for temporary additional duty. He was then instructed that he was to report at the Audubon Building in New Orleans. He was escorted to that building and to a conference room. In the room were two agents of the Federal Bureau of Investigation, a Lieutenant Commander and a Lieutenant of the Navy. A Captain of the

Navy, Captain Fly, a superior officer to petitioner, entered the room, and instructed petitioner as follows:

"You are ordered back for an investigation," and further said, "You will be asked questions by the different ones present." (R. 278)

That, as petitioner testified he was expected to answer, and in being interrupted by the prosecuting attorney as to make clear his position, said to the prosecuting attorney:

"I see you are a former service man; I don't believe at any time, that you failed to disregard your superior officer." (R. 279)

Petitioner testified, he did not volunteer any statement, but answered the questions because he considered he was under orders of a superior officer to do so.

Captain Fly left the room after the questioning of petitioner began, but he appointed a Lieutenant Snyder of the Navy who was there present, to conduct the interview. (See testimony of F.B.I. Agent Stedman (R. 270). And petitioner was asked by the prosecuting attorney, "Well, you knew, as a full commander, you didn't have to answer him, didn't you?" And petitioner replied "Absolutely," (R. 283). But, as to answering the Lieutenant, petitioner said:

> "But you must understand that Captain Fly —don't lose sight of the fact that Captain Fly convened this board of investigation, which was carried through until the minute we left the build-

ing; not when Captain Fly went to play golf." (R. 284)

Upon cross-examination petitioner continued to repeat that he considered he was under orders of a superior officer to answer the questions, and that was why he did so.

As to this, he said:

"A. I repeated that I don't know that those were his exact words; all I had was orders from the Bureau of Naval Personnel to proceed there for temporary duty, and I was turned over to Captain Fly to carry out the temporary duty orders." (R. 285)

And petitioner was questioned by the Court, and answered as follows:

"The Court:

And you made it, voluntarily. Did you or did you not?

The Witness:

Not wholly, no, sir. This signed statement was made, through my understanding that Captain Fly had ordered this board of investigation, and that I should carry out his wishes in making this statement." (R. 291)

Petitioner's testimony is found in the record beginning at page 277 and ending at page 292.

And in corroboration of petitioner's testimony that he

was under military orders to answer the question, F.B.I. Agent Stedman testified, as follows:

> "Q. Mr. Stedman, I wish you'd tell the Court exactly what took place, in the Audubon Building, in connection with this interview, at the time you went in there, and just what took place, as well as you can recall it.
>
> "A. As I recall it, we were all present with the exception of Captain Fly, of the Navy, and Mr. Wortham came in and Captain Fly stated to Commander Wortham that he had been brought here to answer some questions pertaining to his income tax, and that Lieutenant Snyder would conduct the interview; and Lieutenant Snyder then proceeded to interrogate the Commander."

And as proof of the fact that the statement of petitioner was not voluntary, F.B.I. Agent Jennings, testified that petitioner "was reluctant to admit." (R. 260)

Petitioner was not charged by the F.B.I. agents or the Navy before being questioned, nor was he advised of the charge about which he was to be questioned, or advised he could retain counsel, or advised by his superior officer that he could answer or refuse to answer, as he chose, but was instructed by such superior officer that he was ordered there for questioning.

Three confessions were also obtained from Wilfred Andrew Lacour, the co-defendant of petitioner. They were signed confessions (R. 325-337), and which implicated petitioner. They were offered in evidence and admitted in evidence over the objection that they were obtained invol-

untarily, and through corcion and compulsion. (R. 254). Petitioner urged on appeal that it was error of the trial court in admitting the confessions and as they implicated petitioner, and as the jury was instructed by the court that such confessions, formed a part of the whole body of the evidence before them (R. 314) and further charged the jury, as follows:

> "Therefore, the said four statements are to be considered by you as forming part of the evidence, and you may find from your consideration of the whole body of the evidence substantial other evidence, outside of these statements, which, with them, indicates to you beyond a reasonable doubt, that there was a union of minds between the two defendants, who made such statements, to commit an offense against the United States, that is to say, by conspiring together to defraud the United States." (R. 315)

and the admission thereof constituted prejudicial error to petitioner. But the Circuit Court of Appeals held that as petitioner's co-defendant did not appeal, the question as to the admissibility of his confessions in evidence was out of the case.

The confessions of petitioner's co-defendant were obtained by the following procedure:

The co-defendant Lacour, was, at the time of being questioned, an apprentice seaman in the Navy. An F.B.I. agent desired to question him about the crime of which he was later charged and convicted with petitioner, and the Provost Marshal of the base had Lacour brought to the

office under guard. Lacour was not then charged with any crime, and when brought to the Provost Marshal's office, a Lieutenant of the Navy told him he was brought there for an investigation (R. 238-240). Lacour, an apprentice seaman, testified, and as to be expected, that he was under orders to answer the questions. (R. 238-239). He considered that he had to answer the questions. (R. 239). He was then interrogated by the Lieutenant and the F.B.I. agent. The statement so obtained was reduced to writing and signed by Lacour. (R. 325).

Lacour was again questioned. On the second occasion, he was marched from the Naval Station to a car and taken to the Naval Intelligence Office. When he arrived there he was told by a Naval officer that he was there for an investigation. (R. 241-242) He did not volunteer any statement but answered the questions. (R. 242) Lieutenant McCormick testified that on the second occasion, he advised Lacour that he was conducting the investigation, (R. 211) and that Latour did not come voluntarily. (R. 211) And Navy Lieutenant Harlan who was also present advised Lacour he was to be further questioned. (R. 212) At the second interview F.B.I. agent Huiskamp testified, Lieutenant Harlan did most of the questioning of Lacour. (R. 194). The second statement is at page 329 of the record. Lacour was questioned a third time in New Orleans where he had been transferred. The Navy Department at New Orleans advised the F.B.I. that Lacour was available to them for questioning, (R. 223), and Lacour was brought under guard to the Naval Intelligence Office in the Audubon Building in New Orleans. Two F.B.I. agents and two Navy Lieutenants were in the office when Lacour was in custody of a guard

of the Navy. (R. 231) He was brought to the office for questioning. (R. 231) Lacour was there told he was to be questioned again by Lieutenant Snyder who largely conducted the interrogation. (R. 231) Lacour testified he answered all questions because he thought he had to. He did not volunteer any statement, and as he expressed it, "they had to pump it from me." (R. 243) He answered as he testified "Because they ordered me to." (R. 247) The third statement is at page 334 of the record.

As noted, with the Commander, a superior Naval Officer, a Captain, was used to order him to answer, and with his co-defendant, an apprentice seaman, lieutenants of the Navy were used. Superiors in both cases.

SPECIFICATIONS OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In affirming the judgment of conviction.

2. In holding that the confession of petitioner was admissible in evidence.

3. In holding that as Wilfred Andrew Lacour, a co-defendant, did not appeal his conviction, that whether his confession which was admitted in evidence over objection that it was obtained involuntarily, through duress and coercion, was out of the case and admission thereof could not be urged on appeal as prejudicial error by petitioner.

4. In not holding the admission in evidence of the confessions of petitioner's co-defendant were inadmissible, and the error in admitting them over objection, constituted reversible error as to petitioner.

5. In not reversing the conviction of petitioner.

REASONS FOR GRANTING THE WRIT

1. In holding the confession of petitioner admissible, the court below has decided a question of importance, and in a manner inconsistent with decisions of this Court, and contrary to civilized standards of procedure and evidence.

(a) The decision of the court below fails to follow the rule laid down in *McNabb v. United States, 318 U. S. 332*, and as followed in *Anderson v. U. S., 318 U. S. 350*, under which decision, the confession was rendered inadmissible for the following reasons:

The petitioner did not voluntarily appear for questioning, but was brought to the place of questioning by virtue of Naval orders. He was held under military restraint when questioned. He was not charged before being questioned, or advised of the charge about which he was to be questioned. He was not advised by his superior officer he could answer or not as he chose, but, on the contrary, specifically instructed by a superior officer that he was ordered there for questioning, and would be questioned by those present, and this superior officer appointed an officer to conduct the investigation. He was so questioned under such restraint and orders. The civil officers, F.B.I. agents, did not seek petitioner's arrest to charge him before a United States Commissioner, but, through the aid of a superior officer of the Navy compelled petitioner, an inferior officer, to submit to questioning to obtain a confession for use as evidence to convict him of the charge.

This Court, in *McNabb v. United States, 318 U. S. 332,* condemned a procedure of officers taking custody of those accused, and instead of taking them to the nearest United States Commissioner as required under the law, to take them to a place for questioning. Similar to the procedure followed by the F.B.I. in obtaining the confession from petitioner. As to such procedure, this Court in the *McNabb* case, said:

> "Quite apart from the Constitution, therefore, we are constrained to hold that the evidence elicited from the petitioners in the circumstances disclosed here must be excluded. For in their treatment of the petitioners the arresting officers assumed functions which Congress has explicitly denied them. They subjected the accused to the pressures of a procedure which is wholly incompatible with the vital but very restricted duties of the investigating and arresting officers of the Government and which tends to undermine the integrity of the criminal proceeding. Congress has explicitly commanded that "It shall be the duty of the marshal, his deputy, or other officer, who may arrest a person charged with any crime or offense, to take the defendant before the nearest United States Commissioner or the nearest judicial officer having jurisdiction under existing laws for a hearing, commitment, or taking bail for trial . . . ." 18 USCA § 595. Similarly, the Act of June 18, 1934, c. 595, 48 Stat. 1008, 5 USCA § 300a, authorizing officers of the Federal Bureau of Investigation to make arrests, requires that "the person arrested shall be immediately taken before a committing officer." Compare also the Act of March 1, 1879, c. 125, 20 Stat. 327, 341, 18 USCA § 593, which

provides that when arrests are made of persons in the act of operating an illicit distillery, the arrested persons shall be taken forthwith before some judicial officer residing in the county where the arrests were made, or if none, in the county nearest to the place of arrest. Similar legislation, requiring that arrested persons be promptly taken before a committing authority, appears on the statute books of nearly all the states.

"The purpose of this impressively pervasive requirement of criminal procedure is plain. A democratic society, in which respect for the dignity of all men is central, naturally guards against the misuse of the law enforcement process." (p. 341-343)

And further said:

"The record leaves no room for doubt that the questioning of the petitioners took place while they were in the custody of the arresting officers and before any order of commitment was made. Finally, a conviction resting on evidence secured throughsuch a flagrant disregard of the procedure which Congress has commanded cannot be allowed to stand without making the courts themselves accomplices in wilful disobedience of law. Congress has not explicitly forbidden the use of evidence so procured. But to permit such evidence to be made the basis of a conviction in the Federal courts would stultify the policy which Congress has enacted into law." (p. 345)

And, in concluding said:

"In holding that the petitioners' admissions were improperly received in evidence against

> them, and that having been based on this evidence their convictions cannot stand, we confine ourselves to our limited function as the court of ultimate review of the standards formulated and applied by Federal courts in the trial of criminal cases. We are not concerned with la wenforcement practices except in so far as courts themselves become instruments of law enforcement. We hold only that a decent regard for the duty of courts as agencies of justice and custodians of liberty forbids that men should be convicted upon evidence secured under the circumstances revealed here. In so doing, we respect the policy which underlies Congressional legislation. The history of liberty has largely been the history of observance of procedural safeguards. And the effective administration of criminal justice hardly requires disregard of fair procedures imposed by law."

The rule laid down in *McNabb v. United States, supra,* is, we submit, that a federal officer cannot hold an accused in custody, or, as was done with petitioner, cause him to be so held in custody, for the sole purpose of obtaining a confession from the person. The purpose of prohibiting such procedure, we believe, is to avoid exactly what took place in the instant case. The petitioner was not charged before being questioned. He was not advised that he was to be questioned about a crime he was accused of having committed. He was not advised by his superior officer that he could refuse to answer if he chose, but, on the contrary, instructed by his superior officer that he was ordered there to answer the questions, and would be questioned by those present.

We submit that the rule laid down in *McNabb v. United States, supra,* followed by the New Federal Rules

of Criminal Procedure, is intended to prohibit such procedure as followed herein. Under the circumstances, we submit, that the court below was in error in holding that the confession of petitioner was admissible, and such error requires a reversal of petitioner's conviction. *Malinski v. New York, 324 U. S. 401,* and cases therein cited.

(b) Even without the rule as laid down in *McNabb v. United States, 318 U. S. 332,* and followed in *Anderson v. United States, 318 U. S. 350,* the confession of petitioner was inadmissible as having been obtained involuntarily, and through compulsion and coercion. To be made voluntarily, (as the trial court held), it is required that the confession be "made freely, voluntarily, and without compulsion or inducement of any sort." *Bram v. United States, 168 U. S. 532,* quoting from Mr. Chief Justice Fuller, in *Wilson v. United States,* 162 U. S. 623. Under such test, the fact that petitioner was under Naval orders to report for questioning, and so instructed by a superior officer present, and also advised by his superior officer that he was to be questioned by those present, and advised that a named lieutenant would conduct the investigation. Under such restraint, and stress, petitioner did as ordered, answered the questions, and gave a full confession of his guilt. He was not a free agent to do or not as he saw fit, but under duress, compulsion and coercion to give the confession, which, as he testified he would not otherwise have given. Such compulsion constituted a violation of petitioner's rights under the Fifth Amendment, in compelling him to testify against himself. We submit that is a further reason why the lower court erred in holding the confession of petitioner admissible.

2. In holding that as the co-defendant of petitioner did not appeal his conviction, error urged by petitioner to the admissibility of his confessions which implicated petitioner, such question was out of the case, and could not be urged by petitioner, has decided a question of importance, and contrary to the interests of justice.

The confessions of petitioner's co-defendant implicated petitioner, and under the charge of the court to the jury was evidence to be considered by the jury. Yet, even though obtained involuntarily, and through compulsion and coercion, from petitioner's co-defendant, the court below holds that since petitioner's co-defendant did not appeal his conviction, the question cannot, under the decision below be raised by the appealing defendant, since the lower court holds that the question as to the admissibility of his confessions is out of the case. Such holding we submit is erroneous, and contrary to what we submit is the effect of the decision of this Court in *Anderson v. United States, 318 U. S. 350,* wherein this Court, under similar circumstances, said:

> "The Government urges that, even if the confessions are held to be inadmissible, only the convictions of the six petitioners who confessed should be reversed. The prosecution rested principally on these confessions and the testimony of an informant, Freed Long, whose credibility was under severe attack. The incriminating statement of each petitioner implicated all the others, including those who did not confess. To be sure, the trial court devised a procedure under which the confessions were introduced without mention of the

> names of the other persons implicated. But their names were in fact revealed in the course of the cross-examination of the confessing petitioners. So also, while the trial judge appeared to admit the confessions "only to be used against the persons who made them," his charge bound the jury to no such restricted use of the confessions. On the contrary, from what the trial judge told them the jury had every right to assume that in ascertaining the guilt or innocence of each defendant they could consider the whole proof made at the trial. There is no reason to believe, therefore, that confessions which came before the jury as an organic tissue of proof can be severed and given distributive significance by holding that they had a major share in the conviction of some of the petitioners and none at all as t othe others. Since it was error to admit these confessions, we see no escape from the conclusion that the convictions of all the petitioners must be set aside." (pp. 356, 357)

We submit the court below erred in not holding it was error of the trial court in admitting in evidence over objection the confessions of petitioner's co-defendant, and such error requires reversal of the petitioner's conviction.

CONCLUSION

For the foregoing reasons we respectfully submit that this petition for a writ of certiorari should be granted.

EDWIN H. GRACE,
Counsel for Petitioner.

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CITATIONS

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WILLIAM F. WORTHAM, PETITIONER

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 348-350) is reported at 164 F. 2d 979.

JURISDICTION

The judgment of the circuit court of appeals was entered December 30, 1947 (R. 351), and a petition for rehearing was denied February 12, 1948 (R. 360). The petition for a writ of certiorari was filed March 9, 1948. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether a confession made by petitioner, a naval officer, to agents of the Federal Bureau of Investigation and naval investigating officers at a time when no charges had been made against him and he was not under arrest was inadmissible under the *McNabb* rule or because it was not given voluntarily.

2. Whether the trial court erred in admitting the confessions of a codefendant, obtained under similar circumstances.

STATEMENT

On February 12, 1946, an indictment was filed in the District Court for the Eastern District of Louisiana charging petitioner and one LaCour with conspiracy to defraud the United States, in violation of 18 U. S. C. 88 (R. 2-15). The conspiracy consisted of an agreement whereby petitioner, who held the rank of commander in the Navy and who had authority to purchase sporting goods for the Navy, would make his purchases from LaCour's firm and then resell a substantial part of the equipment to the firm for cash, which he would convert to his own use after paying small sums to LaCour. After a jury trial, both defendants were found guilty as charged (R. 21, 321). LaCour was sentenced to imprisonment for a year and a day and fined $600, but execution of the sentence was suspended and he was placed on probation for five years (R. 341-343). Petitioner was sentenced to imprisonment for two years and fined $7500 (R. 343-344). LaCour did not appeal. The judgment as to petitioner was affirmed by the circuit court of appeals (R. 351).

The evidence bearing on the issues raised by the petition may be summarized as follows:

After presenting evidence to show that during 1943 and 1944 petitioner bought athletic equipment for the Navy

from LaCour's firm (R. 97, 160-161), that petitioner also sold merchandise to the firm through LaCour, for which he was paid in cash (R. 100-146), and that petitioner deposited large sums in cash in banks during the same period (R. 51-58, 69-72), the Government offered confessions which both LaCour and petitioner had made. Objection was made that the confessions had not been given voluntarily, whereupon the jury was excused and the court heard evidence on the point.

The Government witnesses testified that when they first sought to question LaCour, it was discovered that he had entered the Navy and was undergoing "boot training" at the Naval Training Station, San Diego, California. An F. B. I. agent and a lieutenant of the Office of Naval Intelligence asked permission of LaCour's superior officer to interview him on July 23, 1945. (R. 168-169, 202-204.) At the onset of the interview, the intelligence officer explained to LaCour who they were and why they had called him in; he was told that he did not have to talk to them if he did not wish to do so, that he could have a naval or civilian representative present if he wished, and that any statement he made might be used against him in court (R. 191, 205, 207, 214-215). There were no threats or promises and there was no demand that he answer any question (R. 170-172, 174, 180, 203, 206-207, 250-251). LaCour was at first reluctant to answer questions, but after he realized that the F. B. I. agent already had considerable information about the matter, he made a statement which was reduced to writing and carefully examined by him before he signed it (R. 169-170, 175-176). He made no complaint that he was being forced to make the statement (R. 171-172, 174, 181, 207). LaCour amplified his statement the following day under substantially similar circumstances, except that on this occasion the F. B. I. agent was accompanied by two naval intelligence officers, one of whom did most of the

questioning. Again there were no threats or promises, nor were any answers demanded; LaCour made no protest and his attitude was described as very cooperative. (R. 182-200, 208-217.) LaCour made a third statement on August 11, 1945; as before, he was told that he did not have to make a statement and no demands were made upon him, but he cooperated fully (R. 219-237).

After the Government witnesses had testified as above, LaCour himself took the stand. He testified that he did not attend any of the interviews voluntarily; that he was not advised of his right to counsel; that he volunteered no information and gave none until it was "pumped" from him by repeated questions; that he felt obliged to answer because the naval officers present told him an investigation was being made, though he admitted that the officers said nothing to indicate that he was under orders to answer. He testified that the F. B. I. agent ordered him to answer; then he modified this by saying that the agent suggested that the judge would give him consideration if he answered; still later he returned to the version that his answers were in response to the agent's demands. (R. 237-248.) The agent, recalled by the Government, testified that he may have told LaCour that his experience was that judges are apt to be favorably disposed toward an accused who cooperates (R. 249-251).

In respect of petitioner's confession, the government witnesses testified that the interview which led up to it took place in the presence of two F. B. I. agents and a captain, a lieutenant commander and a lieutenant of naval intelligence (R. 259-260, 270). The captain told petitioner, who, as noted before, was a full commander, that he had been brought there to answer some questions about his income tax (R. 264, 268, 270). He was then told by the others that he did not have to make a statement and that anything he said might be used against him; there were no demands,

threats or promises and petitioner did not complain about making the statement (R. 260, 261, 271-272). The captain remained in the room for about half an hour, but never ordered petitioner to answer questions and took no part in the actual questioning (R. 260, 266-267, 271). Most of petitioner's admissions and the formulation and signing of his confession took place after the captain left the room (R. 261, 269, 271, 272, 275-276). The written statement was examined by petitioner before he signed it (R. 262-263, 273).

Petitioner himself then took the stand and testified that he had been on leave at the time of these events and was called back for the investigation (R. 277-278); that the captain implied that he was expected to answer questions (R. 278-279); and that he did not give the statement voluntarily but because he believed he should carry out the captain's wishes (R. 280, 284-285, 288, 291). He admitted, however, that he knew that under Navy regulations no one could be forced to make a statement incriminating himself (R. 281-283, 290).

After hearing, in turn, the testimony as to the circumstances of the confessions of LaCour and petitioner, the court ruled that they were freely and voluntarily given. In each instance, the jury was then recalled and informed of the court's ruling admitting the confessions as voluntary, and they were also instructed that the statements of one defendant could not be considered against the other unless the jury found that there was a conspiracy and that the statements had been made in furtherance of the conspiracy. (R. 252-256, 292-295.) At the conclusion of this instruction in respect of petitioner's statement, upon exception by defense counsel that the statements were made after the alleged conspiracy had terminated, the court stated that this was for the jury to determine and instructed them that if the statements were in fact made after the termination of

the conspiracy, they could not have been in furtherance of it (R. 294). The statements were then, in turn, read to the jury (R. 256-257, 295). While the confession of each defendant implicates the others, they give substantially similar accounts of the transactions between the two defendants, without descending to details (R. 325-341). At the close of the Government's case both defendants rested without offering any evidence in their own behalf (R. 307).

In its charge to the jury, the court said that, although the jury's recollection of the facts was ultimately controlling, in the final state of the evidence it was clear that the statements were made after the conspiracy had come to an end and were, therefore, not in furtherance of the conspiracy, and that the confession of one defendant could not under such circumstances be binding upon the other (R. 314-315).

ARGUMENT

1. Petitioner contends (Pet. 9, 10-14) that his confession should have been excluded under the rule of *McNabb* v. *United States,* 318 U. S. 332. But that case involved a "flagrant disregard" of the congressional mandate that a person arrested on a charge of crime be taken promptly before a judicial officer for a hearing. 318 U. S. at 345. "Inexcusable detention for the purpose of illegally extracting evidence from an accused, and the successful extraction of such inculpatory statements by continuous questioning for many hours under psychological pressure, were the decisive features in the *McNabb* case * * *." *United States* v. *Mitchell,* 322 U. S. 65, 67. Petitioner's situation was not parallel to that of the *McNabb* case defendants, or even to that of Mitchell, for he was not in any manner illegally restrained. He was an officer in the Navy and was ordered by his superiors to report for investigation, but he was immediately told by those who were conducting the

investigation that he did not have to answer any questions or make any statement if he did not desire to do so, and he knew that they had no power to force him to answer incriminating questions. He was not under arrest, and, so far as appears from the record, he could have terminated the interview at any time he chose. We submit that he was neither illegally detained nor subjected to unfair treatment during the questioning.

Petitioner's contention that the confession was not made voluntarily but that he was coerced by the orders of his superiors (Pet. 14) is equally untenable. We think it clear from the testimony summarized in the Statement, *supra,* that, while petitioner was ordered to appear for the investigation, there was abundant evidence to support the trial court's finding that the confession was made freely and voluntarily.

2. Petitioner's final contention (Pet. 15-16) is that the circuit court of appeals erred in holding that since LaCour had not appealed there was no issue before it as to his confession. Petitioner argues that LaCour's confession was involuntary, and that, therefore, its admission constituted reversible error as to petitioner since it implicated him and since the court charged the jury that it was evidence to be considered.

We think this argument is without merit. In the first place, the circuit court of appeals did not say that the issue of LaCour's confession was no longer in the case; the opinion is silent on that point. Furthermore, we think it clear from the evidence set forth in the Statement, *supra,* that the trial court correctly ruled that LaCour's confession was voluntary and not obtained in violation of the rule of the *McNabb* case. Petitioner's reliance upon *Anderson* v.

United States, 318 U. S. 350, is misplaced since in that case there was a clear violation of the *NcNabb* rule.[1]

CONCLUSION

For the reasons stated, we respectfully submit that the petition for a writ of certiorari should be denied.

PHILIP B. PERLMAN,
Solicitor General.
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April, 1948.

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[1] We note that the court's charge as to the confessions was not exactly correct in view of this Court's decision in *Fiswick* v. *United States,* 329 U. S. 211, 217, for, while the jury were told that the statement of one conspirator can be used against a co-conspirator only when made in furtherance of the conspiracy, and were further told that it was clear from the evidence that the confessions were made after completion of the conspiracy and "could not possibly" have been made in furtherance of it, still the ultimate decision as to the facts was left to the jury (R. 314-315). This point, though once raised by petitioner (R. 295), was ultimately abandoned. Counsel expressed (R. 320-321) his entire satisfaction with the charge (see Rule 30, F. R. Crim. P.), and his only objection to LaCour's confessions, both in the circuit court of appeals and in the present petition, is directed to the issue of compulsion. Furthermore, in the *Fiswick* case, the jury were specifically instructed that the confessions *were* made in furtherance of the conspiracy, whereas here the jury were told that, in the Judge's opinion, it was clear from the evidence that the confessions were *not* in furtherance of the conspiracy. Under the circumstances, and especially in view of the similarity of the confessions in describing the transactions between the two defendants and of petitioner's abandonment of the point, we think it presents no problem. Cf. *Blumenthal* v. *United States,* 332 U. S. 539, 559-560; *Statler* v. *United States,* 164 F. 2d 94 (C. C. A. 5) certiorari denied February 2, 1948, No. 479, this Term.

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